No. 18,257

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYTHEON COMPANY, a corporation,
Appellant and Cross-appellee,

vs.

RHEEM MANUFACTURING COMPANY, a corporation, and RHEEM SEMICONDUCTOR CORPORATION, a corporation,
Appellees and Cross-appellants.

Reply Brief of Rheem Manufacturing Company and Rheem Semiconductor Corporation as Appellants on Cross-Appeal

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Raytheon asserts, astonishingly (Br. 3, 4, fn. 2),[1] that it is not "clear in what respects cross-appellants contend the court below erred" because our brief on the cross-appeal "does not contain a specification of errors as required by Rule 18, par. 2(d) of this

1. All references to Raytheon's brief are to its brief as Cross-Appellee.

Court." But the nature of our claim of error was stated with exactness and precision.[2] If it lacked anything, it was only the formal rubric "specification of error". But the purpose of this Court's Rule 18, par. 2(d) is to enable the Court to see what issues are submitted to it; it serves no ritualistic end.[3] Nevertheless, as was recognized as permissible in *Greyhound Corp. v. Blakley,* 262 F.2d 401, 407, 409 (9 Cir. 1958), to remove even the slightest basis for criticism we now state one.

Specification of Error

The District Court erred in concluding, in stating its conclusion as a finding, and in adjudging, that Raytheon's notice of February 2, 1962 (a copy of which is attached to the complaint as Exhibit 7) exercised its right of first refusal with respect to the items included in the offer of Manufacturing to Semiconductor, and gave rise to a valid binding contract between Raytheon and Semiconductor whereby Semiconductor became bound to sell said assets to Raytheon for

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2. The sole issue on the cross-appeal was stated at pp. 22 and 26 of the single brief filed by us as appellees and cross-appellants. On the *very first* of the 9 pages entitled the Argument on the cross-appeal (p. 70) we stated that our appeal was solely from that part of the judgment (there quoted) which adjudged that the notice given by Raytheon to Semiconductor on February 2, 1962 (Ex. 7 to complaint) was a sufficient exercise of its right of first refusal, gave rise to a binding contract to buy and sell for $531,584, and vested title in Raytheon. This had been plainly stated in our notice of appeal itself (R. 171). On the *second* of the 9 pages we said that Semiconductor's letter of January 26, 1962 to Raytheon (Exhibit 5 to complaint), notifying Raytheon of Manufacturing's offer, was an offer to sell the assets to Raytheon for $531,584, that

> "The sole question on the cross-appeal is: Was this offer accepted by Raytheon's letter of February 2, 1962?"

and that this issue is purely a question of law.

3. *Brotherhood of Locomotive F. & E. v. Butte, A. & P. Ry. Co.,* 286 F.2d 706, 710 (9 Cir. 1961); *Empire Printing Company v. Roden,* 247 F.2d 8, 15, 16 (9 Cir. 1957); *D'Aquino v. United States,* 192 F.2d 338, 348 (9 Cir. 1951).

$531,584, or any other sum, and that in consequence title to the assets vested in Raytheon.[4]

DISCUSSION

Raytheon's brief does not deny any of the following statements made in our brief:

1. Semiconductor's letter of January 26, 1962 notifying Raytheon of Manufacturing's offer was an offer to sell the assets to Raytheon for $531,584, if accepted within 5 days.

2. The issue is one of offer and acceptance, viz., was Raytheon's letter of February 2, 1962 an acceptance of that offer of Semiconductor's?

3. This is a pure question of law.

4. An acceptance must be unconditional.

The essential fallacy in Raytheon's argument is that it ignores the fact that the lease gave Raytheon *two distinct and different options* to buy assets, and these two options were not alternatives at the choice of Raytheon, but each existed only if the other did not. If Semiconductor had a bona fide offer from another, Raytheon had a five-day option to purchase by matching the other's price. In the absence of such an offer from another, Raytheon had an option to buy at a price differently determined.

Raytheon's brief treats these two different options as one option and in effect argues that it exercised its option, gliding over

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4. This specification is itself but a compressed version of the "statement of points on which [we] intend to rely on [our] cross-appeal" (R. 172) where we stated that we "intend to rely on the following point on [our] appeal, namely, that the notice given by plaintiff Raytheon Company to Rheem Semiconductor Corporation by its letter of February 2, 1962, a copy of which is attached to the complaint as Exhibit 7, was not an exercise of the right of first refusal of Raytheon Company with respect to the items included in the offer from defendant Rheem Manufacturing Company to defendant Rheem Semiconductor Corporation, did not give rise to a valid binding contract between plaintiff Raytheon Company and defendant Rheem Semiconductor Corporation, whereby said defendant Rheem Semiconductor Corporation became bound to sell said assets at all and that in consequence title to said assets covered by said offer did not vest in plaintiff Raytheon Company at any time."

the fact that it declined to exercise the only option open to it and sought to exercise the option that was not available.

The gist of its argument is that its letter of February 2, 1962, unequivocally agreed to buy the assets at whatever price was required—the amount offered by Manufacturing if Manufacturing's offer was valid, or, if Manufacturing's offer was not valid, at a price differently determined. To this there are two separate answers:

First: Raytheon's letter of February 2, 1962 cannot fairly be so construed. It *did* say that Raytheon elected to buy the assets, but it did *not* say that it would do so for $531,584 if necessary. It plainly said that the price it would pay would have to be determined pursuant to other provisions of the agreement. It did *not* say that, if the other provisions were not applicable, Raytheon committed itself to pay $531,584.

Second: Even if the letter were construed as Raytheon now wishes it, it would not have been an unqualified acceptance of *Semiconductor's* offer. Here Raytheon's argument, just as it merges two options, confuses two different offers. One was an offer *by Manufacturing* to buy *from Semiconductor.* The other was an offer *by Semiconductor* to sell *to Raytheon,* comprised in its notice. Regardless of whether or not a court of law should *later* hold that *Manufacturing's* offer was "bona fide", *Semiconductor's offer* to Raytheon was an offer to sell at $531,584 *and at no other price.* It is true that *if* Manufacturing's offer were not "bona fide", Raytheon could have ignored Semiconductor's offer. But Manufacturing's offer was bona fide, as has now been adjudged, and therefore Raytheon could purchase *only by unqualifiedly accepting the precise offer made by Semiconductor.* It had to make its choice. It had no right to hedge. Raytheon states (Br. p. 2) that, "Unquestionably Raytheon had a right to question the bona fides of the offer [of Manufacturing]." Unquestionably so. But in doing so, it took the risks of finding itself in error. It could

not fasten that risk on to Semiconductor and thus possess the best of both worlds, as it consistently has tried to do in every phase of the case. Raytheon continues (Br. pp. 2, 3), "Even while raising the question, its election to purchase in accordance with the provisions of the contract was unconditional." But this statement contains the vice of ignoring that there were two different and mutually exclusive option provisions of the lease.[5]

Raytheon argues that "that is certain which can be made certain" (Br. p. 3) and thereby apparently seeks to evade the obvious truth of the submission in our brief (p. 73), that "an acceptance qualified by the condition that the other party must first litigate and win a lawsuit clear through the Court of Appeals cannot rationally be called 'absolute or unqualified' ". But *there was no need for anything to be made certain. Semiconductor's offer was as certain as certain can be as to price, viz.,* $531,584. Litigation was not necessary to make this certain. Litigation followed because Raytheon sought a judgment that it was entitled to ignore *Semiconductor's offer* and exercise *the other option.*

Raytheon's final argument (Br. 4-6) is that if an offeree, in stating his acceptance of the offer, expresses a term of the contract that would exist even were it not expressed in words, he does not thereby lessen the absolute nature of his acceptance. This is an obvious truism, for in such a case the express statement in the acceptance neither adds nor subtracts anything from the *terms of the contract which the unconditional acceptance of the offer brings into being. But the truism is not applicable here.* The plain distinction is between expressing a term or condition

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5. The sliding character of Raytheon's argument is also illustrated by its next paragraph (Br. p. 3);

> "The mere suggestion that Rheem and/or Semiconductor would cut off Raytheon's rights by an artificial offer at an impossibly high price—if the offer should eventually be held to be not bona fide—implies that this Court could condone a fraud."

If Manufacturing's offer were held not to be bona fide, the question raised by the cross-appeal would not be present. Semiconductor's offer of January 26, 1962 would have been a nullity.

of the contract that comes into being by the *unqualified acceptance*, on the one hand, and imposing a condition on the acceptance, on the other. Here, if Raytheon's letter of reply to *Semiconductor's offer* to sell for $531,584 can be construed as a willingness to pay $531,584 in any circumstance, it placed on that statement the condition that first the parties had to litigate until a court of law should adjudge that Manufacturing's offer was a bona fide offer.

Here, just as Raytheon's argument confuses the existence of two options and two offers, it uses the word "contract" to refer to two different things. There was the contract which gave Raytheon its options, i.e., the lease. And there is the contract of purchase and sale that would have come into existence if Raytheon had validly exercised the option available to it. Raytheon's letter of February 2, 1962 did not attempt to state any term that would be present in the contract of purchase and sale that would have come into existence *if* Raytheon had unqualifiedly accepted Semiconductor's offer. What it did was to assert what it believed to be its rights under the contract of lease—a belief that turned out to be mistaken.

Raytheon (Br. 6, 7) tries to distinguish the cases cited by us, but those cases speak for themselves.

The Relief to Which Cross-Appellants Are Entitled

Finally, Raytheon asserts (Br. p. 8, fn. 3) that "Rheem's contention that it is entitled to damages for wrongful conversion of the list 'B' assets that were the subject of its offer is *frivolous*", because the judgment below declared that title to the assets had vested in Raytheon in February 1962, adding, blandly, that one cannot be guilty of conversion of property to which it has title! True, one cannot, but our claim to damages is predicated on the submission that this part of the judgment must be reversed on our cross-appeal. Raytheon will then have been in possession, *without title*, of the assets for in excess of a year after any right to possession was ended by termination of its lease. Indeed, it

will have been in possession of the assets while not even offering to pay the $531,584 which the judgment adjudicated that it had to pay for the title it purported to declare. Raytheon's belief, however honest, that it had title is no defense. 48 Cal. Jur. 2d Sec. 3, p. 537; Sec. 32, p. 574. "A mistake of law or fact is no defense. 'Persons deal with the property in chattels or exercise acts of ownership over them at their peril' ", Prosser, The Law of Torts, 71 (2 ed. 1955). Frivolity lies in the contention that Raytheon could hold property under an erroneous claim of title and yet escape any liability, and in the further assertion that cross-appellants did not obtain a "stay". There was no way Manufacturing could oust Raytheon of possession without first obtaining a reversal, on this cross-appeal, of the portion of the judgment from which it has appealed. No "stay" can be conceived of which would do so.

Here, as in so many aspects of this case, Raytheon's attitude is that "heads I win and tails you lose"; that it never committed itself to anything, never had to take any risk that its positions and conduct might be in error; that it would profit if it were right but would suffer nothing if it were wrong.

CONCLUSION

We respectfully submit that paragraph 2 of the judgment should be reversed, with directions to the District Court to determine and award judgment for Manufacturing in the amount of the damages occasioned by Raytheon's conversion of the assets.

Dated: June 3, 1963.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MOSES LASKY